Peat Manufacturing Company *and* Produce, Refrigerated & Processed Foods & Industrial Workers, Local 630, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 21-CA-19568

April 21, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On September 23, 1981, Administrative Law Judge Gordon J. Myatt issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order,[3] as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Peat Manufacturing Company, Norwalk, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following at the end of paragraph 2(b):

"in the manner set forth in the section of this Decision entitled 'The Remedy.'"

2. Insert the following as paragraph 2(e):

"(e) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith."

DECISION

STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge: Upon a charge filed on September 19, 1980, and a first amended charge filed on October 24, 1980, by Produce, Refrigerated & Processed Foods & Industrial Workers, Local 630, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereafter called the Union), against Peat Manufacturing Company (hereafter called the Respondent), the Regional Director for Region 21 issued a complaint and notice of hearing on October 30.[1] The complaint alleged, *inter alia*, that since May 19, 1977, the Union has been the exclusive bargaining representative of Respondent's employees in an appropriate unit. Further, since October 2, 1980, the Union has requested that the Respondent furnish it with certain information considered relevant to the performance of its function as the collective-bargaining representative, and the Respondent has refused to do so. The complaint also alleged the Respondent laid off employee John H. Taylor, on or about May 2, without giving prior notice to the Union or affording it an opportunity to bargain with respect to the layoff, and refused to recall Taylor thereafter. Finally, the complaint alleged that Taylor was laid off and not recalled because he appeared as a witness for the General Counsel in a prior case involving the Respondent and because he engaged in union or other protected concerted activity. It was alleged that by this conduct, the Respondent violated Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act, as amended, 29 U.S.C. 151, *et seq.* (hereafter called the Act). The Respondent filed a timely answer admitting certain allegations of the complaint, denying others, and specifically denying the commission of any unfair labor practices.

A hearing was held on this matter on July 9, 1981, in Los Angeles, California. All parties were represented by counsel and afforded full opportunity to examine and cross-examine witnesses and to present material and relevant evidence on the issues. At the beginning of the hearing, counsel for the General Counsel advised that on July 6, 1981, the Regional Director issued an order ap-

[1] Chairman Van de Water and Member Hunter agree that Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to notify the Union and affording it an opportunity to bargain regarding its decision to lay off employee John Taylor. In so doing, they note that for institutional reasons they accept the Board's findings in *Peat Manufacturing Company*, 251 NLRB 1117 (1980), as the law of that case although they did not participate in rendering that decision.

[2] The Administrative Law Judge found that Respondent had violated Sec. 8(a)(5) and (1) of the Act by failing to notify the Union and give it an opportunity to bargain about the layoff of unit employee John Taylor. Respondent argues that the Union should be estopped from singling out the layoff of this one employee when Taylor was laid off in the middle of a series of layoffs and the Union had never requested that Respondent bargain about the previous layoffs and did not request that Respondent bargain about the Taylor layoff after it occurred. The legality of the other layoffs is not at issue here. With regard to the Taylor layoff, it is clear that Respondent failed to fulfill its initial responsibility to notify the Union and to offer to bargain prior to implementing the layoff. Hence the Union, when it became aware of the layoff, was presented with a *fait accompli*, making a request to bargain about it a futile and unnecesssary gesture. *L. E. Davis d/b/a Holiday Inn of Benton, et al.*, 237 NLRB 1042, 1044 (1978); *Alfred M. Lewis, Inc.* v. *N.L.R.B.*, 587 F.2d 403 (9th Cir. 1978), enfg. 229 NLRB 757 (1977). Moreover, Respondent has generally refused to recognize or bargain with the Union until a court of appeals enforces a prior Board Order directing Respondent to do so. See 251 NLRB 1117 (1980). In these circumstances, it would have been a futile gesture for the Union specifically to request bargaining about the Taylor layoff. See *GAF Corporation*, 218 NLRB 265, 266 (1975); *B. F. Goodrich Company, et al.*, 250 NLRB 1139, 1140 (1980). See also *Sunnyland Refining Company, Inc.*, 250 NLRB 1180, fn. 3 (1980).

[3] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[1] Unless otherwise indicated, all dates herein refer to the year 1980.

proving the Union's request to withdraw the charges which provided the basis for the allegations that Taylor was laid off in violation of Section 8(a)(1), (3), and (4) of the Act, as well as the charges supporting the allegation that the Respondent refused to provide the Union with certain information in violation of Section 8(a)(1) and (5) of the Act. In his order, the Regional Director dismissed all portions of the complaint pertaining to these allegations.[2] As a consequence, the only issue remaining in the case for litigation is the allegation that the Respondent laid off Taylor without notifying the Union and affording it an opportunity to negotiate and bargain with respect to the layoff.

Upon the entire record in this case, including my observation of the witnesses and their demeanor while testifying, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Peat Manufacturing Company, is, and has been at all times material herein, a corporation engaged in the manufacture and distribution of zinc and aluminum die casting and plastic injection molding. The Respondent's facility involved herein is located in Norwalk, California. In the course of its business operations, the Respondent annually sells and ships goods and products valued in excess of $50,000 directly to customers located outside the State of California. The pleadings admit, and I find, that the Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Produce, Refrigerated & Processed Foods & Industrial Workers, Local 630, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Preliminary Discussion*

Official notice is taken here of the Board's Decision and Order issued on August 27, 1980, in a prior case involving the Respondent and the Union.[3] Although the complaint in the instant case alleges the Union is the exclusive bargaining representative of the employees in an appropriate unit, the Respondent's answer denies this. Having taken official notice of the Board's decision in the prior case, the Respondent's denial is hereby rejected. Accordingly, I find the unit set forth below to be appropriate and the Union to be the exclusive representative for purposes of collective bargaining for all of the employees in that unit.

The appropriate unit for purposes of collective bargaining is:

> All production and maintenance employees including trainees, inspectors, plant clerical employees, janitors, shipping and receiving employees, truck drivers, leadmen and working foremen employed by Peat Manufacturing Company at its facility located at 10700 East Firestone Boulevard, Norwalk, California, but excluding all other employees, office clerical employees, professional employees, technical employees, guards and supervisors as defined in the Act.

B. *The Layoff of Taylor*

The testimony given and the evidence introduced in this case is not in any substantial conflict. Taylor testified, and the Respondent admitted, that he was laid off on May 5.[4] A list was provided by the Respondent, in response to a subpena, showing the number of employees laid off in 1980. This list was introduced into evidence as General Counsel's Exhibit 6 and Taylor's name appears thereon.[5] Testimony by the Respondent's plant manager, William Mueller, clearly establishes that the Respondent did not notify the Union of Taylor's layoff, neither prior to the event nor subsequent thereafter. Robert W. Ruby, business agent of the Union, testified he learned of Taylor's layoff from the employee the evening after it occurred. Ruby testified that at no time were any of the union representatives notified by Respondent's officials that Taylor would be laid off.

Mueller testified that while the Respondent never told the union representatives that Taylor would be laid off, he felt they should have been aware that the Respondent would have to lay off employees for business reasons. According to Mueller, because the Respondent was a supplier of parts for automobile wheels and there was an economic slowdown in the automotive industry, it was common knowledge that layoffs were occurring at the Respondent's facility. Nevertheless, Mueller acknowledged that he never called the union representatives or instructed anyone from the plant to notify the union representatives of any layoffs, including the layoff of Taylor.

Concluding Findings

The sole issue in this case is whether the Respondent was under a duty to notify the Union, as the exclusive bargaining representative, of the decision to lay Taylor off on May 5 and to afford the Union an opportunity to bargain about that decision. If such a duty existed under the Act, then, even under the narrow set of facts presented here, the Respondent has violated Section 8(a)(5) and (1) of the Act.

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[2] See G.C. Exh. 1(h).

[3] *Peat Manufacturing Company*, 251 NLRB 1117. On December 22, the General Counsel made application for enforcement of the Board's Order with the United States Court of Appeals for the Ninth Circuit. (G.C. Exhs. 2 and 3). On December 31, the Court of Appeals docketed the case (see G.C. Exh. 4) and at the time of the hearing herein, the case was still on the court's docket pending decision.

[4] Although the complaint recites "on or about May 2," the precise date of the layoff was established as May 5.

[5] While the list reveals that a number of other employees were also laid off by the Respondent during 1980, the only issue raised by the complaint and treated here is the layoff of Taylor.

The Respondent's defense seems to be primarily grounded on the theory that since it is resisting the Board's order in the prior case directing it to resume recognition of and bargain with the Union, as the representative of the unit employees, there is no current duty to continue bargaining with the Union until a final ruling is made by the court. This argument is unsound and based on fallacious reasoning. It is well settled that collateral litigation does not suspend the duty to bargain under Section 8(a)(5). *John Cuneo, Inc.*, 257 NLRB 551 (1981); *Montgomery Ward & Co., Inc.*, 228 NLRB 1330 (1977); *Metropolitan Petroleum Company of Massachusetts, Div. of Pittston Company*, 216 NLRB 404 (1975). As the Board observed in the *Cuneo* case:

> Indeed, Section 10(g) of the Act provides that the commencement of proceedings under Section 10(e) or (f), which provide for court review of Board orders, "shall not, unless specifically ordered by the court, operate as a stay of the Board's order."

Therefore, the claim that the Respondent has no obligation to bargain with the Union until the Ninth Circuit acts on the Board's request for enforcement of its order in the prior case must be rejected out of hand.

This poses the crucial question of whether there existed a duty to notify and afford the Union an opportunity to bargain regarding the layoff of Taylor. Here again the case law is settled. In a recent case where a union won a Board-conducted election, and the employer filed objections which were pending final determination, the employer laid off employees for 1 day without notice to or bargaining with the union. There, the Board held that "[a]lthough an employer may properly decide that an economic layoff is required, once such a decision is made the employer must nevertheless notify the Union, and, upon request, bargain with it concerning the layoffs, including the manner in which the layoffs and any recalls are to be effected." *Clements Wire & Manufacturing Company, Inc.*, 257 NLRB 1058 (1981). The Board held that by failing to do so while the objections to the election were pending, the respondent acted at its peril and, since the union was thereafter certified as the collective-bargaining representative of the employees, the respondent violated Section 8(a)(5) and (1) of the Act. *Id.* This same proposition has been stated by the Board in previous cases. See, for example, *Hillcrest Furniture Manufacturing Co., Inc.*, 253 NLRB 72 (1980); *Mike O'Connor Chevrolet-Buick-GMC Co., Inc., and Pat O'Connor Chevrolet-Buick-GMC Co., Inc.*, 209 NLRB 701, 703–704 (1974).

Thus, if an employer violates the Act by failing to notify a union of a unit layoff and affording it an opportunity to bargain regarding that decision, where the union recently won an election to which objections were pending and it was subsequently certified, the conduct in the instant case must be considered equally violative of the Act. In the case before the Ninth Circuit for enforcement, the Board found the Respondent unlawfully withdrew recognition of the Union as the collective-bargaining representative and ordered it to recognize and, upon request, bargain with the Union. Hence, the Union's representative status here never ceased to exist at the time Taylor was laid off. There can be no question that the layoff of unit employees without notifying and affording the collective-bargaining representative an opportunity to bargain regarding such action is a unilateral change in the terms and conditions of employment which violates Section 8(a)(5) of the Act. *Clements Wire & Manufacturing Company, Inc., supra; Master Slack and/or Master Trousers Corp., and Hardeman Garment Corp., and Morehouse Garment Corp, and Lauderdale Garment Corp., and Labelville Garment Corp.*, 230 NLRB 1054 (1977). Since the pending enforcement proceeding in the prior case does not operate to stay the Board's Order, the Respondent here has effected a unilateral change without complying with its bargaining obligation to the Union. *John Cuneo, Inc., supra; Montgomery Ward & Co., Incorporated, supra.* Nor does the fact that, in the limited circumstances of this case, the layoff relates to only one unit employee alter the Respondent's duty to the collective-bargaining representative. The duty to notify and afford the Union an opportunity to bargain remains the same whether one employee or more than one employee is involved in the layoff. Cf. *Bay State Gas Company*, 253 NLRB 538 (1980) (where the employer was held to violate the Act by eliminating a single job without notifying or bargaining with the union). Accordingly, I find the Respondent here has violated Section 8(a)(5) and (1) of the Act by failing to notify the Union of its decision to lay off an employee on May 5 since this conduct had the effect of bypassing, undercutting, and undermining the Union's status as the exclusive representative of the employees.

CONCLUSIONS OF LAW

1. The Respondent, Peat Manufacturing Company, is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Produce, Refrigerated & Processed Foods & Industrial Workers, Local 630, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. The above-named labor organization has been, and is now, the exclusive representative of all of the employees in the unit described below for purposes of collective bargaining within the meaning of Section 9(a) of the Act:

> All production and maintenance employees including trainees, inspectors, plant clerical employees, janitors, shipping and receiving employees, truck drivers, leadmen and working foremen employed by Peat Manufacturing Company at its facility located at 10700 East Firestone Boulevard, Norwalk, California, but excluding all other employees, office clerical employees, professional employees, technical employees, guards, and supervisors as defined in the Act.

4. By failing to notify the Union and to afford it an opportunity to bargain regarding the decision to lay off

employee John Taylor on May 5, 1980, the Respondent has violated Section 8(a)(5) and (1) of the Act.

5. The above conduct constitutes an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has committed an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act, it shall be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Since it was established at the hearing that Taylor has since been recalled by the Respondent, the Respondent shall be ordered to make this employee whole for any loss of pay he has suffered by reason of the Respondent's unlawful conduct during the period of his layoff. Backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest to be computed thereon in the manner set forth in *Florida Steel Corporation*, 231 NLRB 615 (1977).[6]

Upon the foregoing findings of fact, conclusions of law, the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[7]

The Respondent, Peat Manufacturing Company, Norwalk, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unilaterally laying off employees without notice to or consultation with the Union as the exclusive representative of all of its employees in the bargaining unit described below prior to taking such action.

(b) Refusing to bargain with Produce, Refrigerated & Processed Foods & Industrial Workers, Local 630, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of the employees in the unit described below by laying off employees without notice to or consultation with said labor organization. The appropriate bargaining unit is:

> All production and maintenance employees including trainees, inspectors, plant clerical employees, janitors, shipping and receiving employees, truck drivers, leadmen and working foremen employed by Peat Manufacturing Company at its facility located at 10700 East Firestone Boulevard, Norwalk, California, but excluding all other employees, office clerical employees, professional employees, technical employees, guards, and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, bargain collectively and in good faith with Produce, Refrigerated & Processed Foods & Industrial Workers, Local 630, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive representative of the employees in the unit set forth above concerning layoffs of bargaining unit employees.

(b) Make whole John Taylor for any loss of pay suffered as a result of his unilateral layoff on May 5, 1980.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary and relevant to analyze and compute the amount of backpay due under the terms of this recommended Order.

(d) Post at its Norwalk, California, facility copies of the attached notice marked "Appendix."[8] Copies of said notice on forms provided by the Regional Director for Region 21, after being duly signed by the Respondent's authorized representative, shall be conspicuously posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

[6] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

> WE WILL NOT lay off employees without notifying and consulting with Produce Refrigerated & Processed Foods & Industrial Workers, Local 630, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of our employees in the following unit:

All production and maintenance employees including trainees, inspectors, plant clerical employees, janitors, shipping and receiving employees, truck drivers, leadmen and working foremen employed by Peat Manufacturing Company at its facility located at 10700 East Firestone Boulevard, Norwalk, California, but excluding all other employees, office clerical employees, professional employees, technical employees, guards, and supervisors as defined in the Act.

WE WILL NOT refuse to bargain with the above-named Union as the exclusive collective-bargaining representative of the employees in the above unit by unilaterally laying off employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them under Section 7 of the National Labor Relations Act, as amended.

WE WILL, upon request, bargain collectively in good faith with the above-named Union as the exclusive representative of our employees in the unit described above concerning layoffs.

WE WILL make whole John Taylor for any loss of pay he may have suffered, with interest, by reason of our unlawful action in refusing to bargain with the Union regarding his layoff on May 5, 1980.

PEAT MANUFACTURING COMPANY